IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 193

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WATERMAN STEAMSHIP CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF AND ARGUMENT OF WATERMAN STEAMSHIP CORPORATION.

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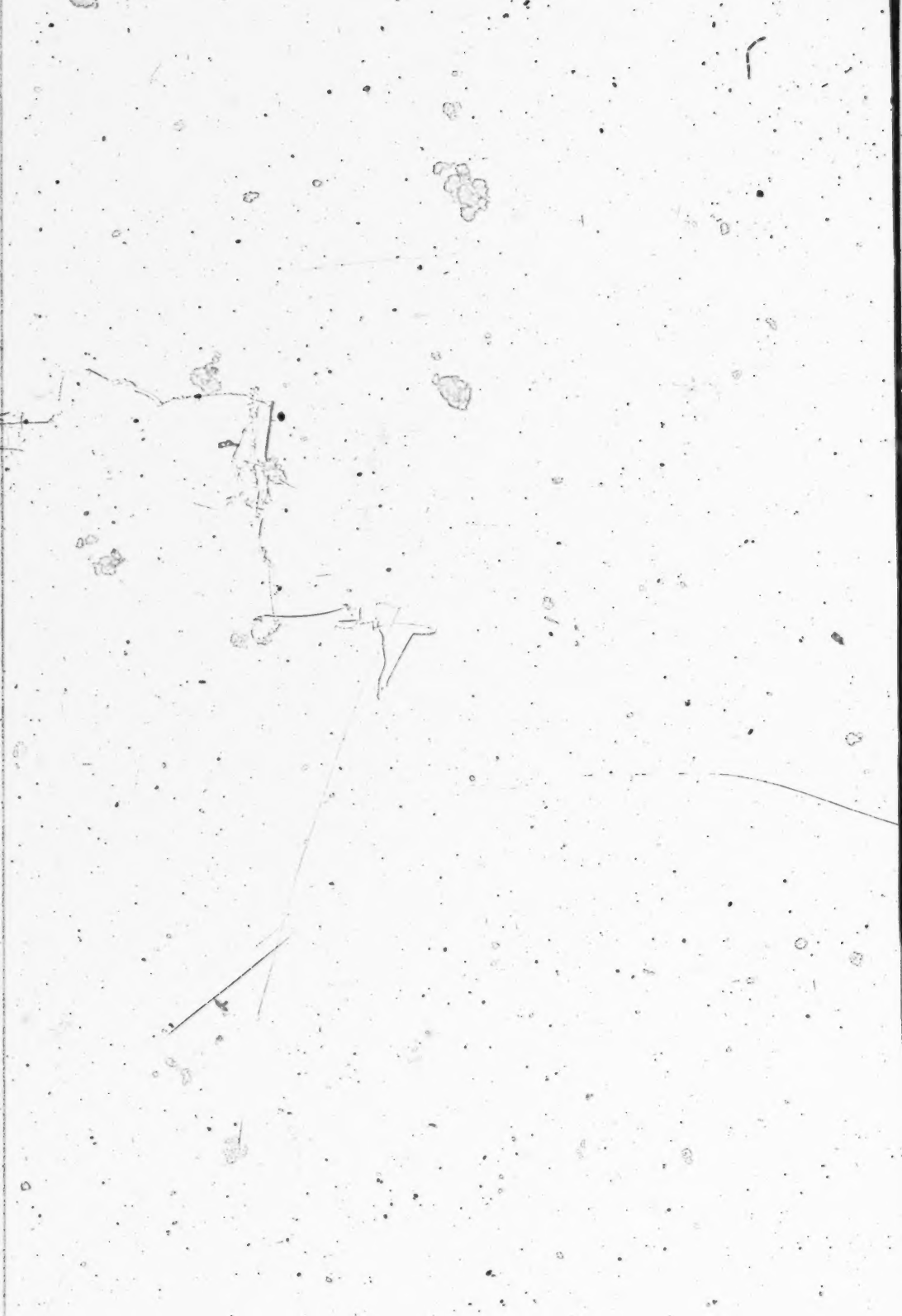
TABLE OF CASES.



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Owing to the fact that during the oral argument certain matters were presented and certain questions were propounded by the Court, which were not fully discussed in our brief filed on behalf of respondent, the Court granted us leave to file this supplemental brief.

In his closing remarks, and in answer to a question propounded to him by one of the Justices, Mr. Robert B. Watts, attorney for the National Labor Relations Board, stated

that the Record shows that representatives of the I. S. U. were permitted to come on board vessels of the Waterman Steamship Corporation at all times and contact the members of the crew. In support of this statement, Mr. Watts cited to the Court (R. 179) where E. J. Pelletier, one of the witnesses called on behalf of the National Labor Relations Board, testified as follows:

> Q. Were you a member of the I. S. U. when you made this second trip on the "Bienville," that you have told us about?
> A. Yes, sir.
> Q. And while you were a member of the I. S. U. on that boat, do you know whether the I. S. U. representatives were permitted to come on board?
> A. At all times.
> Q. Were they permitted to contact the men?
> A. Yes, sir.
> Q. Was there anyone from the company accompanying these I. S. U. representatives to see that they only collected dues?
> A. No, sir.
> Q. There was no one to see that they did not do any organization work?
> A. I do not recollect seeing anyone with them.
> Q. Do you know whether or not I. S. U. representatives solicited members while they were on board?
> A. I could not say.

It will be noted from the foregoing that Pelletier was testifying as to what the practice had been during the time he was a member of the crew of the S. S. Bienville, and this, of course, was prior to the time that Captain Nicholson had given written instructions under date of July 13, 1937, to the masters of all of the Waterman Steamship Corporation's ships to the effect that the Waterman Corporation would not allow any delegates from either union to board their vessels for the purpose of soliciting memberships. Consequently, that part of the record cited by

Mr. Watts had no bearing whatever on the question propounded to him by one of the Justices as no one has ever contended that prior to the time that these written instructions were given by Captain Nicholson representatives of the I. S. U. were not permitted to solicit memberships in their union on board ships of the Waterman Corporation.

The question was asked by the Court as to whether or not there was any affirmative act on the part of the Waterman Steamship Corporation terminating the employment of the seamen, other than the discharge before the United States Shipping Commissioner. Mr. Watts took the position that there was an affirmative act of discharge of all of the unlicensed personnel in addition to the "signing off" of the articles. In support of his position he cited the remarks made by Captain Reed, shown on page 226 of the Record. It will be noticed that this statement by Captain Reed was in reply to a question by the seaman as to whether he would be allowed to go out again when the ship sailed. There may have also been other scattered instances in which the question was asked by a seaman as to whether or not he could be employed for the next voyage and in each case the reply was to the effect that because of the contract with the I. S. U., the seaman could not be employed on the next voyage as long as he remained a member of the N. M. U. There is no evidence whatsoever in the record that the respondent took any affirmative step in laying off or discharging the entire unlicensed personnel. It was understood both by the steamship company and by the seamen that the employment had terminated when the men were discharged before the United States Shipping Commissioner. The scattered instances in which officials of the company stated to the seamen that they could not be reemployed for the next voyage would certainly not amount to such an affirmative act. There is an exception to this statement in the case of Pelletier, as there was an additional reason for the termination of his employment.

In support of his contention that the employment of seamen is continuous even though they have signed articles providing for one voyage only, Mr. Watts referred to the testimony of Pelletier. Pelletier was necessarily an interested witness. Mr. Watts stated and reiterated in reply to questions from the Court that there was an absolute uniformity in the testimony of the witnesses as to the continuity of employment and that there was no testimony to the contrary. We wish to call to the Court's attention testimony of Captain R. G. Dobbin, on pages 428, 429 of the Record. Captain Dobbin was United States Shipping Commissioner at Mobile and an absolutely disinterested witness. He testified that he had had seafaring experience for approximately twenty-five years and that he had been Shipping Commissioner for approximately nine years (R. 428). We will not prolong this brief by quoting this testimony in full, but respectfully direct the Court's attention to all of this testimony on the last half of page 428 and the first half of page 429 of the Record. His testimony may be summed up by the following question and answer:

> Q. And is it customary and generally understood in maritime circles that when a seaman signs for one voyage that he, when the voyage is terminated, and he signs before the United States Shipping Commissioner, that his term of employment is ended?
>
> A. Oh, his term is through; there ain't no question about that. (R. 429)

In connection with the point as to the continuity of employment and the point as to whether or not the employment of the seamen is terminated by discharge from the shipping articles, Chief Justice Hughes asked the following question in the course of oral argument: If a seaman should be injured after he has "signed off" shipping articles and has been discharged by the United States Shipping Commissioner, but before he has signed articles on a

subsequent voyage, would he be entitled to maintenance and cure?

From the cases which we have been able to find we believe that the seaman would not be entitled to maintenance and cure under such circumstances.

The only two cases which we have been able to find on this proposition are *The Bouker No. 2* (2d C. C. A.), 241 Fed. 831 (833), and *Hennessy v. M. & J. Tracy, Inc.* (4th C. C. A.), 295 Fed. 680, (681). In the *Bouker* case there was raised the question as to when a seaman would be entitled to maintenance and cure. The court, after stating that he is entitled to maintenance and cure when "he falls sick or is wounded in the service of the ship" proceeded further to define this situation as follows:

> "We may state our opinion that a seaman 'falls sick, or is wounded, in the service of the ship,' if such misfortune attacks him while he is attached to the ship as part of her crew. It is not necessary that the wound or illness should be directly caused by some proven act of labor; it is enough that he was, when incapacitated, subject to the call of duty as a seaman, *and earning wages as such.*"
>
> *The Bouker No. 2* (2d C. C. A.), 241 Fed. 831 (833).

In the *Hennessy* case, the facts showed that the seaman received his pay and discharge, went down to his quarters to get his belongings, and in leaving the ship immediately thereafter, slipped on a ladder and was injured. The court, in holding that the seaman was entitled to maintenance and cure, made the following statement:

> "Nevertheless, we think, the obligation of the ship to furnish maintenance and cure attaches to accidents which happen in the brief interval between the time a seaman is paid off and formally discharged and the subsequent time at which, in ordinary course, he actually gets physically away from her. He went on her

as a seaman, and for the purpose in hand he did not cease to be one until he was safely off her."

Hennessy v. *M. & J. Tracy, Inc.* (4th C. C. A.), 295 Fed. 680 (681).

The inference from the foregoing opinion is clear that while the seaman may still have the right to maintenance and cure until he could safely get off the ship immediately after being discharged, he would not have the right to maintenance and cure after he safely left the ship.

During the course of oral argument, Mr. Justice Reed mentioned the fact that testimony shows that when the Waterman Steamship Corporation desired to hire a seaman who had formerly made a voyage on the same boat, it could do so without having to hire the man through the I. S. U. hiring halls. This fact does not in any way show that the employer and the union regarded the employment as continuous. The contract between the employer and the union required the employer, "as vacancies occur," to give preference of employment to members of the I. S. U. (Respondent's Exhibit No. 14, Article II, Section 1.) The contract did not require the employer to go to the I. S. U. hiring halls in order to give such preference of employment. The Board does not dispute the fact that prior to the shift of allegiance on July 2, 1937, the respondent's unlicensed personnel were 100 per cent members of the I. S. U. The employer could, therefore, arrange to fill any vacancy by hiring any of its former employees, and comply with the provision to give preference of employment to I. S. U. members.

Under these circumstances, this custom followed by the employer and the union does not show that "vacancies" within the meaning of the contract did not occur each time a crew "signed off" the articles, and was discharged.

In his oral argument, Mr. Watts accused counsel for respondent of speaking "in vacuo". He took the position

that counsel for respondent were merely making assertions that there was no evidence to support certain findings of the Board, although he contended that such evidence was in the Record, and cited some of the evidence which, as he contended, supports the findings of the Board. The statement that there is no evidence to support a finding is a negative statement and to go through the Record reciting the evidence which is there in order to show the absence of evidence to support the findings of the Board would require much space and time. We believe that when the Court reads those portions of the Record referred to in petitioner's brief, in the light of the circumstances of the case as pointed out in respondent's brief, it will be quite apparent that the inferences drawn by the Board are unfounded. We pointed out in our original brief, and have also pointed out in this brief, several instances in which statements made by counsel for petitioner are not supported by the Record. These instances are typical of the statements made throughout the brief of petitioner. Certain parts of the Record are referred to which may, at first glance, seem to support the inference drawn by the Board. But when these parts of the Record are read with their context, and in the light of all of the circumstances surrounding the case, it immediately becomes apparent that the inference by the Board is not at all justified by the evidence.

During the oral argument much stress was laid by counsel for the Labor Board on the fact that Captain Nicholson had testified that certain steel had been ordered for use in repairing the S. S. Bienville, but later on when Captain Nicholson was shown a letter referring to the Azalea City, he testified that the Azalea City and the S. S. Bienville were sister ships and that *when the material in question was ordered*, he was not sure whether the plans were to use this material on the Azalea City or on the Bienville (R. 372), as pointed out in our original brief. The written records showing the location and disposition of each of the

Waterman ships during the period from April 1937 through August 1937 were kept by Captain Clarence Reed, who was captain of the port and kept accurate written records as to the location of each of the Waterman ships and where they were due at certain periods. This record was fully explained in respondent's Exhibits Nos. 24 and 25.

It is true that in the *American France Line et al.* case pending before the National Labor Relations Board that a stipulation had been filed in New York by the New York attorneys for the Waterman Steamship Corporation, which stipulation showed that the Bienville was to depart on July 2 and would be at Panama City on July 5, at Pensacola on July 8, at Gulfport on July 9 and Mobile on July 11 to July 15 (R. 371). Captain Nicholson testified that he did not know anything about the stipulation which was filed with the National Labor Relations Board in New York. However, Captain Nicholson reiterated his statement that he knew several weeks beforehand, and in the month of May, that they had planned to repair the Bienville (R. 371). What probably happened is that the stipulation for use in the *American France Line, et al.* case was made up at the time this proceeding commenced showing the scheduled sailings some months in advance, and the New York attorneys apparently did not know of the change in the plans relative to the Bienville and merely used the old schedule. Certainly, in view of Exhibits Nos. 24 and 25, it cannot be seriously contended that plans had not been made to lay up the Bienville for repairs long prior to her arrival in Mobile and prior to the time there had been any shift of union affiliations by some members of the crews of these vessels.

During oral argument, the Court asked whether or not there would be a violation of the Act in the event a steamship company should bring a ship back to its return port sooner than previously scheduled, for the purpose of discharging the crew (for union activities) sooner than would

otherwise occur. In this case it is not contended by the Board that the "Fairland" was brought into Mobile any sooner than its normal course. In connection with the "Bienville", the Board contends that stops between Tampa and Mobile were cancelled, and attempts to find significance in the fact that the purpose of this cancellation of stops was not explained by the respondent. There was never any necessity at the hearing for respondent to explain the purpose or reason for the cancellation. The letter ordering the cancellation of stops, sent by the Port Captain (Respondent's Exhibit No. 25) is dated July 1, 1937, indicates in the body thereof that it was written before the arrival of the "Bienville" in Tampa, and the Board never offered any evidence that this was not its true date. The Board found as a fact that the change of union affiliation by the crew of the "Bienville" took place on July 2, 1937, (R. 108), *after the letter was written.*

The respondent had no knowledge of change of affiliation before July 2, 1937, at the earliest. There is testimony by a seaman that the crew discussed in Havre, France, the possibility of making a change to the N. M. U., but there is absolutely no evidence which we can find indicating that any responsible officer or official of respondent knew this fact..

While we referred in our original brief to the fact that it was entirely immaterial to the Waterman Steamship Corporation what unions its employees belong to, yet inasmuch as during the oral argument one of the Justices inquired as to what, if any, declarations were made by the executives of the Waterman Steamship Corporation on this point, we think it well to here set out a few extracts from the testimony of Captain Nicholson from the Record, clearly showing the position taken by the Waterman Steamship Corporation.

> A. The fact that the men changed to the N. M. U. had nothing to do with the tying up of the boat and con-

ceivably we were not going to tie up any vessel as long as we could earn money with her. (R. 288)

Q. Now, captain did the fact that these employees, or some of them, engaged in concerted activities with other employees for the purpose of collective bargaining with respect to rates of pay, and so forth, have anything whatever to do with the termination of their employment?

A. No, sir.

Q. Even after you knew they joined the N. M. U., you still permitted them to stay on board the ship until their voyage was over?

A. Correct. (R. 294)

Q. Captain, have you, or has any officer, or anyone representing your company, so far as you know, at any time tried to persuade any of the seamen to join one union or another?

A. No, sir, we have not.

Q. Have you or any officer of the Waterman Steamship Corporation, or anyone acting for it, to your knowledge at any time tried to interfere with the men on the ships, or restrain them, or coerce them in any manner as to what union they should belong to?

A. No, sir. (R. 295)

As to the smoothness and lack of friction with which the Waterman Steamship Corporation has at all times dealt with its employees, we might call the Court's attention to the further testimony of Captain Nicholson, found on page 296 of the Record, as follows:

A. I might add that the Waterman Steamship Corporation is the only steamship company in the United States that has not had a delayed sailing of their vessels, or had any trouble within their vessels during the past three years. Everyone of the Waterman Steamship Company vessels on sailing schedule went out with first class, competent crews on the boat, they being the only shipping company in the United States who can boast of that record. (R. 296)

It was owing to testimony of this kind that at the conclusion of the testimony, as attorneys for the Waterman Steamship Corporation we made the following motion, which was denied by the trial examiner:

> Now, comes the Waterman Steamship Corporation, the respondent in the above styled cause, and all the evidence having been introduced and all parties having rested and the evidence showing without dispute that the Waterman Steamship Corporation, under its contract with the International Seamen's Union of America, an affiliate of the American Federation of Labor, has employed on its ships members of the said International Seamen's Union of America, and the record further disclosing without controversy that the Waterman Steamship Corporation, during the existence of its contract with the said International Seamen's Union of America, has never been delayed in any manner whatsoever in the sailing of any of its large fleet of vessels, and the National Labor Relations Act, under which this proceeding is instituted, being termed "An Act to diminish the causes of labor disputes burdening or obstructing interstate or foreign commerce, etc.," and it now appearing conclusively from the evidence that neither interstate nor foreign commerce has ever been in any manner burdened or obstructed by the action of the Waterman Steamship Corporation, the respondent, now complained of, the said Waterman Steamship Corporation now moves that the complaint as last amended filed against it in this proceeding be dismissed on the following separate and several grounds:
>
> 1. For that the evidence fails to show that the respondent has been guilty of any violation of the National Labor Relations Act.
>
> 2. For that the evidence fails to show that the respondent has been guilty of any unfair labor practices as defined in the National Labor Relations Act.
>
> 3. For that the evidence fails to show that the respondent has interfered with, restrained, or coerced

employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

4. For that the evidence fails to show that the respondent has by discrimination in regard to hire or tenure of employment or any term or condition of employment encouraged or discouraged membership in any labor organization.

5. For that the evidence shows that the respondent, at all times mentioned in the complaint, was bound by a contract recognized as valid by the National Labor Relations Act to give preference of employment to members of the International Seamen's Union.

6. For that the evidence shows that the refusal of the respondent to grant passes on board its ships to organizers of the National Maritime Union did not have the effect of interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act. (R. 528-529)

We respectfully submit to the Court that the decision of the United States Circuit Court of Appeals for the Fifth Circuit setting aside and denying enforcement of the order of the Board (except as there modified) should be affirmed.

Respectfully submitted,

GESSNER T. MCCORVEY,
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MCCORVEY, MCLEOD, TURNER & ROGERS,
Mobile, Alabama,
Of Counsel.

I, C. A. L. Johnstone, Jr., do hereby certify that on this the 4th day of January, 1940, I mailed copies of the foregoing brief, postage prepaid, to Robert H. Jackson, Esq., Solicitor General of the United States, Washington, D. C., and to Charles Fahy, Esq., General Counsel of National Labor Relations Board, Washington, D. C., counsel for Petitioner.

Executed this .... day of January, 1940.

.....

(C. A. L. Johnstone, Jr.)